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No. (1)

Supreme Court, U.S.
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In The

Supreme Court of the United States

JOHN A. HICKEY,

Petitioner,

v.

A. LEE BIANCUR, et. al.,

Respondents.

On Petition For A Writ Of Certiorari To The Ninth Circuit Court Of Appeals

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether the Ninth Circuit erred in affirming the district court's denial of Mr. Hickey's motion to set aside the default judgment, pursuant to Fed. R. Civ. P. 60(b), on the first amended complaint where the only sought and granted clerk's default was on the second amended complaint, a complaint the district court ruled was invalid as neither having been improperly filed nor properly served?

2. Whether the Ninth Circuit erred in affirming the district court's denial in denying Mr. Hickey's motion to set aside the default judgment, pursuant to Fed. R. Civ. P. 60(b), on the first amended complaint where respondents' motion for default judgment was a motion for default judgment on the non-filed and improperly served second amended complaint, there was no notice to Mr. Hickey, who had appeared through counsel, that default judgment was sought on the first amended complaint, and the district court itself advised the parties in advance of its final opinion and order that it believed judgment of default would be entered, if at all, on the second amended complaint?

3. Whether the Ninth Circuit erred in affirming the district court's denial of Mr. Hickey's motion to set aside the default judgment, pursuant to Fed. R. Civ. P. 60(b), on the first amended complaint that had been served more than 10 months after it had been filed, in violation of Fed. R. Civ. P. 4(m), and where respondents had obtained no extension of the requirement that the complaint be served within 120 days?

QUESTIONS PRESENTED – Continued

4. Whether the Ninth Circuit erred in affirming the district court erred in (a) striking Mr. Hickey's answer to the first amended complaint where respondents had not obtained an entry of clerk's default as to Mr. Hickey on the first amended complaint prior to his filing of the answer; and (b) subsequently failing to set aside the default judgment, pursuant to Fed. R. Civ. P. 60(b), on the first amended complaint where a valid answer had been filed?

5. Whether the Ninth Circuit erred in relying on the doctrine of "law of the case" to decide the appeal and failing to address the merits where Mr. Hickey's claim is that the district court lacked jurisdiction to enter the judgment, and this Court has clearly said that addressing that subject matter jurisdiction is a threshold question for any Court?

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ORDER BELOW

On February 22, 2007, The Ninth Circuit filed its Opinion in this case ("The Opinion").[1] In The Opinion, The Ninth Circuit affirmed the district court's denial of Mr. Hickey's motion, pursuant to Fed. R. Civ. P. 60(b), to set aside the default judgment. On May 17, 2007, the Ninth Circuit denied Mr. Hickey's Petition for Rehearing and Suggestion for Rehearing *En Banc*.[2] On August 8, 2007, this Court granted Petitioner's Motion for Enlargement of Time within which to file a Petition for Certiorari, ordering any Petition to be filed by September 14, 2007. On October 2, 2001, the district court filed its written order denying Petitioner's motion under Fed. R. Civ. P. 60(b)(4).[3]

JURISDICTION

The jurisdiction of the Court is invoked pursuant to Title 28, U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Fed. R. Civ. P. 4(m), Fed. R. Civ. P. 60(b), Fed. R. Civ. P. 55(a), Fed. R. Civ. P. 55(b).

SUMMARY OF ARGUMENT[4]

In its final opinion and order granting class action respondents' motion for default judgment against Mr. Hickey, the district court concluded that Mr. Hickey had defaulted by failing to answer the first amended complaint. However, the clerk's default, under Fed. R. Civ. P. 55(a), was based on respondents' application and declaration

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[1] A copy of the Opinion is attached hereto as Appendix A.

[2] A copy of this Order is attached hereto as Appendix D.

[3] A copy of this Order is attached hereto as Appendix C.

[4] ECR refers to the Excerpts of Record before the Ninth Circuit; CR refers to the Clerk's Record before the district court.

that Mr. Hickey had failed to answer the *second amended complaint*. The district court also ruled, however, that the second amended complaint was inoperative because it was never filed by respondents.

The district court erred in predicating its judgment of default on a clerk's default entered as to a complaint never filed and improperly served because no summons was attached. Because there was no clerk's default on the first amended class action complaint, the complaint upon which the district court entered default judgment, its judgment of default must be vacated.

Mr. Hickey appeared in this action, through counsel, in March, 2000, [CR 280], and responded to respondents' motion for default judgment against him. However, respondents' motion was for default judgment on the second amended complaint. The court, at a hearing on March 30, 2000, made clear that it intended to enter a default judgment, if at all, on the second amended complaint. Long after the final hearing on this matter and all briefing was completed, the district court entered its final opinion, judgment and order on June 29, 2000. The district court ruled that the default judgment would be taken on the first amended complaint. Because the notice to Mr. Hickey concerning the judgment of default on the first amended complaint was deficient – he was responding to a motion by respondents and a ruling by the court that the default judgment would be on the second amended complaint – this Court must vacate the default judgment.

In addition, it is not in dispute that the first amended complaint was served on Mr. Hickey more than 10 months after it was filed. This was well outside the 120 day requirement of Fed. R. Civ. P. 4(m). It is also clear from the record that respondents never received an extension of the 120 days. Because of the violation of Rule 4(m), the entry of the default judgment must be vacated.

Finally, inasmuch as the clerk's default sought and obtained by plaintiff was on the second amended complaint, a complaint the district court has ruled was non-operative because respondents neglected to file it, Mr.

Hickey was not precluded from answering the first amended complaint. A party may answer a complaint if the clerk has not entered a default. Once such an answer is filed to a complaint prior to the clerk's entry of default on such complaint, the answering party is permitted to defend the action. Because of this, Mr. Hickey did file an answer to the first amended complaint because no clerk's default had been sought upon it by respondents, and none had been entered. The district court erred first in striking the answer, and then in entering a judgment of default against Mr. Hickey, when the filed answer entitled him to the right to defend this action.

The Ninth Circuit and other courts have held that a Rule 60(b) motion filed within one year of the judgment, as is the case here, is presumptively timely. Further, a 60(b) motion may properly raise the question of whether a district court's default judgment was void for lack of subject matter jurisdiction. A judgment based upon a complaint not served and not filed cannot stand because the issuing court was bereft of any jurisdiction to enter such a judgment. Finally, the correction of the failure of the district court to give 3-day notice under Rule 55(b)(2) prior to entering a default judgment on the first amended complaint is clearly cognizable in a motion under Rule 60(b).

Because Mr. Hickey's argument was that the district court lacked subject matter jurisdiction, the Ninth Circuit erred in deciding Mr. Hickey's arguments based upon the law of the case doctrine. When a court is forced with the question of subject matter jurisdiction, it must first decide that question before entertaining other arguments. Because the Ninth Circuit failed to address Mr. Hickey's meritorious arguments that the district court lacked subject matter jurisdiction and that the default judgment was therefore void under Fed. R. Civ. P. 60(b)(4), as was required, this Court must remand to the Ninth Circuit to consider such argument.

STATEMENT OF FACTS

A. Procedural Background And Facts

Since the district court entered a void default judgment against Mr. Hickey and he has never had an opportunity to contest respondents' allegations on the merits, the relevant facts to this appeal involve the case's procedural history. His appeal centers on the large number of errors and irregularities which, according to the district court, "respondents' [sic] arguably committed . . . in regards to filing and serving the required documents." [ER 13 at 521; CR 313].

On June 27, 1995, respondents filed the original class action complaint in this case. [ER 16 at 532; CR 1]. Respondents alleged a number of causes of action arising from their investments in two California limited real estate partnerships, Continental Capital Secured Capital with Income Fund I, ("Fund I"), and Continental Capital Secured Capital with Income Fund II, ("Fund II"). *Id.* The respondents alleged causes of action against two individuals, Mamie Tang and John Hickey, and three institutional defendants, the law firms of Pillsbury, Madison & Sutro and Zrenda, Dunn & Swan, and D.E. Frey, the broker-dealer for the partnership investments, (collectively "the Institutional Defendants"). *Id.* No summons was issued for the original complaint and respondents did not attempt service of the original complaint on any defendant. *Id.*

Instead, respondents filed a first amended complaint, ("FAC"), on July 20, 1995. [ER 1; CR 6]. Respondents served the summons and FAC on all the defendants, except for Mr. Hickey. [ER 16 at 533; CR 7]. As for Mr. Hickey, the 120th day after the complaint was filed by which Fed. R. Civ. P. 4(m) mandates that the complaint must be served was November 17, 1995. Respondents failed to serve the summons and FAC on Mr. Hickey before November 17, 1995. [ER 16 at 533-35]. They also failed to seek any extension at all from the court of the time prior to November 17, 1995 within which to serve Mr. Hickey. *Id.*

Meanwhile, the Institutional Defendants filed motions to dismiss the FAC in October of 1995. [ER 16 at 533-34;

CR 16, 17, 18, 23]. Defendant Mamie Tang answered the complaint. [ER 16 at 533; CR 15]. The case was then assigned to Judge Fern Smith. [ER 16]. Judge Smith scheduled a hearing on the Institutional Defendants' motions to dismiss for December 8, 1995. [ER 16 at 537; CR 58].

In anticipation of the December 8, 1995 hearing, respondents and the defendants that had been served, *i.e.*, Ms. Tang and the Institutional Defendants, filed a joint case management conference statement on December 1, 1995. [ER 2; CR 48]. In the December 1 statement, respondents for the first time discussed the service issues related to Mr. Hickey. [ER 16 at 533-35]. Respondents requested that "the time for service [on Mr. Hickey] be extended for an additional 90 days, during which respondents will either personally serve Hickey or will request that this Court issue an order permitting substituted service under California law in accordance with Fed. R. Civ. P. 4(e)(1)." *See* Joint Case Management Statement and Proposed Order filed December 1, 1995, at 5. [ER 2 at 80; CR 48].

Respondents neither effected personal service within the 90 days following December 1, 1995, nor did they seek an order from the Court allowing for substituted service of process under California law. [ER 16 at 536-37]. Respondents did not raise the issue of the time limit for service on Mr. Hickey with the court again. [ER 16].

1. The December 8, 1995 Hearing On The FAC

On December 8, 1995, Judge Smith conducted a hearing on the Institutional Defendants' motions to dismiss the FAC. [ER 3; CR 58]. Counsel for all the parties, except Mr. Hickey who had not been served, were present. *Id.* The hearing focused on the motions to dismiss. *Id.* After extensive argument, Judge Smith granted the motions to dismiss with leave to amend. [ER 16 at 537; CR 60, 61].

2. The Second Amended Complaint That Was Never Filed

The respondents did, in fact, draft a complaint to replace the deficient FAC. [ER 4]. Respondents' Second Amended Complaint ("SAC"), is dated January 19, 1996. *Id.* The SAC, however, was ***never filed***, a fact that did not become known to any of the parties until four years later. [ER 16]. For the next four years, all the parties to the litigation operated on the mistaken belief that the SAC was the operative pleading in this case.

The SAC names the Institutional Defendants, Ms. Tang and Mr. Hickey. [ER 4 at 135]. Respondents apparently served the Institutional Defendants and Ms. Tang with the SAC. [ER 16 at 538-39; CR 68, 77, 78]. No summons for the SAC, as to any defendant, was either sought from the clerk of court or issued. [ER 16 at 537-40].

3. The May 29, 1996 Service On Mr. Hickey

The district court found that "Mr. Hawkins [plaintiff's process server] served Mr. Hickey on May 29, 1996." [ER 13 at 519; CR 313]. The court concluded that respondents personally served the FAC and SAC and the summons for the FAC. [ER 13 at 520; CR 313]. Respondents did not serve a summons for the SAC – and could not have, because none existed.

According to the district court, respondents first served the first amended complaint more than 10 months after it had been filed on July 20, 1995. The date of service was also more than 6 months ***after*** the December 8, 1995 hearing at which Judge Smith supposedly "appeared willing to extend the time for service" and more than 3 months ***after*** the 90 day extension respondents had requested in the December 1, 1995 case management conference statement had expired. In short, only a *post hoc* extension of the time for service on Mr. Hickey could make respondents' service of the FAC timely under Fed. R. Civ. P. 4(m).

4. Entry Of Default

On August 9, 1996, respondents requested that the clerk of the court enter a default against Mr. Hickey. [ER 16 at 543; CR 127, 128]. In order to comply with the mandates of Fed. R. Civ. P. 55(a), respondents filed the declaration of their counsel, Jeffrey Lawrence, Esq., to support the request. [ER 5; CR 128]. Mr. Lawrence's declaration makes clear that respondents sought entry of clerk's default under Fed. R. Civ. P. 55(a) based on Mr. Hickey's failure to answer the Second Amended Complaint:

> This action was commenced on June 27, 1995 by the filing of the complaint and issuance of a summons. Thereafter, on January 19, 1996, the complaint was amended (the '***Second Amended Class Action Complaint***').

[ER 5 at 227; CR 128] (emphasis added).

In describing the complaint on which respondents sought entry of default, Mr. Lawrence sets forth violations, such as "Title 18 U.S.C. sections 1961 et seq. (the 'RICO' statute), violations of California Corporations Code sections 25401, 25501, and 25504, respondents alleged in the SAC, but not in the FAC. *Id.*

Mr. Lawrence further declared that Mr. Hickey had failed to timely respond to the SAC, not the FAC:

> Defendant John A. Hickey's time to answer or otherwise respond to the ***Second Amended Class Action Complaint expired on June 18, 1996***. Defendant John A. Hickey has failed to file a pleading or motion or otherwise contact respondents' counsel.

Id. (emphasis added).

Clearly, respondents sought a default on the SAC based on their mistaken belief that it had been filed and was the operative pleading against Mr. Hickey. Mr. Lawrence never discusses the time to respond to the FAC or Mr. Hickey's failure to do so. [ER 5; CR 128].

In accordance with Mr. Lawrence's request for default, the clerk of court entered default on the SAC – a complaint

which had never been filed – against Mr. Hickey four days later on August 13, 1996. [ER 5 at 224; CR 130].

For the next over three years, respondents contented themselves to do nothing more with the default on the non-filed SAC that the clerk had entered against Mr. Hickey. [ER 16 at 543-556]. During this period, respondents failed to move for a default judgment against Mr. Hickey and nothing more occurred in respondents' action against Mr. Hickey. *Id.* Further, respondents failed to move to certify the class in the SAC; accordingly, the district court never issued an order certifying the class of plaintiffs, as alleged in the SAC, pursuant to Fed. R. Civ. P. 23, and the class was never certified prior to plaintiffs' request for entry of clerk's default on the SAC, or prior to their motion for default judgment on the SAC.

Respondents failed to take any further action despite representations they had made to Judge Smith that they would move expeditiously for a default judgment against Mr. Hickey. On August 29, 1997, Judge Smith conducted a hearing on respondents' motion for approval of partial settlement with the Institutional Defendants. At the hearing, Judge Smith inquired about the status of proceedings against Mr. Hickey. [ER 7 at 271; CR 191]. The respondents represented that they would move to perfect the default entered against Mr. Hickey at the hearing on the final approval for the settlement with the Institutional Defendants scheduled for October 31, 1997: "The 31st [of October], we will have a plan to deal with that end of the case. What I would envision is that perhaps we make a motion . . . [to] perfect the default with respect to Hickey. . . ." [ER 7 at 272; CR 191].

Respondents, however, took no action whatsoever to reduce the default to a judgment prior to the October 31, 1997 hearing. [ER 16 at 549-551]. In fact, they waited for three years to do anything further. [ER 16 at 549-556].

While respondents and the Institutional Defendants settled respondents' claims and they were dismissed, nothing more occurred in the proceedings against Mr. Hickey. *Id.*

5. The Reassignment Of The Case And The Granting Of A Default Judgment

In August of 1999, this matter was re-assigned from Judge Smith, who had relocated to the Federal Judicial Center in Washington, D.C., to Judge William Alsup, who had recently been appointed to the federal bench. [ER 16 at 555; CR 248]. While the respondents had indicated no desire to pursue the litigation against Mr. Hickey during the over three years that had elapsed since they obtained a default in August 1996, Judge Alsup issued an order directing the parties to appear on December 1, 1999 for a case management conference. [ER 16 at 556; CR 253].

At the December 1, 1999 hearing, Judge Alsup instructed the respondents to file a motion to take the default judgment [ER 8; CR 257 at 308-311].

Respondents finally filed a motion for default judgment on the SAC, December 30, 1999. [ER 9; CR 258]. Like the Lawrence declaration they submitted in support of their request for entry of the default, respondents' motion for entry of default makes clear that they sought a default judgment on the SAC, not the FAC. *Id.*

Respondents identified the SAC as the operative pleading in the case against Mr. Hickey: "Because on December 4 and 5, 1995, the Court sustained, with leave to amend, the claims brought against defendants PM&S [Pillsbury Madison & Sutro], Zrenda and Frey [the Institutional Defendants], respondents ***filed a second amended complaint*** on January 19, 1996." [ER 17 at 567; CR 268][5] (emphasis added).

Indeed, the litigation between respondents and the Institutional Defendants had been litigated and was settled on the basis of the SAC. [ER 17 at 568; CR 268]. Accordingly, respondents in their motion for a default judgment alleged that Mr. Hickey had failed to respond to the SAC, not the FAC:

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[5] In fact, as the district court correctly found "the second amended complaint was never filed." [ER 13 at 523; CR 313].

> Defendant John A. Hickey's time to answer or otherwise respond to the Second Amended Complaint expired on June 18, 1996. Rule 12 of the Federal Rules of Civil Procedure. Defendant John A. Hickey failed to file a pleading or motion, or otherwise contact respondents' counsel. Tabacco Decl. para. 5. Accordingly, pursuant to respondents' request, the Court Clerk entered default on August 13, 1996. Tabacco Decl. para. 6, Exh. C.

[ER 9 at 321; CR 260].

Similarly, respondents submitted a proposed order recounting that they served the SAC and that Mr. Hickey failed to respond to the SAC. [ER 9 at 326; CR 260].

The district court conducted a hearing on respondents' motion for default judgment against Mr. Hickey on March 30, 2000. [ER 10; CR 290]. Because respondents believed that the SAC had been filed, they had noticed the hearing for default judgment on the basis of the SAC. At the hearing on the default judgment, the parties discovered for the first time in the litigation that had been pending for almost five years that the SAC may not have been filed and was not the operative pleading in the case. *Id.*

At the March 30 hearing, Mr. Hickey raised the issue of whether the SAC had ever been filed. [ER 10 at 344; CR 290]. Because respondents' counsel was unable to verify whether the SAC, in fact, had been filed, the district court examined the court file. [ER 10 at 346; CR 290]. While the parties and Judge Alsup were unable to locate a filed copy of the SAC, the judge's courtroom deputy located a copy of the SAC attached to a pleading filed by one of the Institutional Defendants. *Id.* Ironically, defendant Pillsbury, Madison & Sutro had attached the SAC as an exhibit to the declaration of a legal assistant in support of its motion to dismiss the SAC. [ER 10 at 373; CR 290].

On the basis of this purported "filing," the district court concluded: "So in a roundabout way, Mr. Tabacco's [respondents' counsel] second amended class action complaint was filed, albeit as part of a February 23rd, 1996 filing by the Pillsbury firm." *Id.* The district court then

unambiguously held at the conclusion of the hearing that the SAC had been filed as an attachment to the Pillsbury filing: "[*I*] ***find that the second amended complaint was, in fact, filed in the court records.***" [ER 10 at 393; CR 290]. Therefore, the question of the filing of the SAC was no longer at issue: "All right, the fact that the second amended complaint was never filed is – actually, now we see it was filed via the Pillsbury, Madison & Sutro firm, so that's no longer a point." [ER 10 at 378; CR 290].

Thus, at the conclusion of the March 30 hearing, the district court definitely held that the SAC had been filed as the operative pleading against Mr. Hickey because it was attached as an exhibit to defendant Pillsbury, Madison & Sutro's motion to dismiss.

Mr. Hickey identified a number of other irregularities in the service and filing of required documents at the hearing. First, he maintained that respondents had failed to timely serve the complaint within 120 days as mandated by Fed. R. Civ. P. 4(m), *i.e.*, assuming a May 29, 1996 service date, the FAC was served 10 months after it was filed and the SAC five months after counsel represented it had been filed.

Based on this misrepresentation, (*see* pp. 2-6, *supra*), the lower court concluded that "I'm overruling the 120-day objection." [ER 10 at 393; CR 290].

Second, Mr. Hickey objected because the summons with which he was supposedly served failed to identify which of the two complaints were served on him, the FAC and SAC. As the court inquired of respondents "[b]ut which is the one that you're entitled to get a judgment on? The amended class action complaint or the second amended?" [ER 10 at 359; CR 290].

Respondents responded that Mr. Hickey could not have been prejudiced by the summons' failure to identify the operative complaint because the two were identical as to him.

> Mr. Tabacco: I am happy to stipulate that I am only entitled to get a judgment in the amended class action complaint because ***as to Mr. Hickey***,

> ***the allegations are absolutely identical to the allegations in the second amended complaint.***
>
> The Court: What was the change?
>
> Mr. Tabacco: The changes related to the allegations with respect to Pillsbury, Madison & Sutro's role with regard to the case, and the Zrenda, Dunn firm's role in the case.

Id.

These two statements made by Mr. Tabacco are in contradiction with the actual complaints. Not only are the allegations not "absolutely identical," they are substantially and materially different, having added four and deleting one cause(s) of action. *See* page 9, *supra*, [ER 1, 58-73] and [ER 4, 192-223]. They are also in contradiction to the statement under oath, by Mr. Lawrence of Mr. Tabacco's firm in his declaration seeking a clerk's default on the unfiled and improperly served (without a summons) second amended complaint. Mr. Lawrence specifically described causes of action not included in the first amended complaint. Page 11, *supra*.

The court held that "[I]'m going to overrule the defects in the summons as inconsequential." [ER 10 at 393; CR 290].

Mr. Hickey also filed an answer to the FAC on that April 20, 2000. [ER 11; CR 299], on the theory that because no clerk's default had been taken on the FAC, but rather on the non-filed and improperly served SAC, he could still file an answer.

At an April 24, 2000 evidentiary hearing on whether Mr. Hickey had been properly served, the parties continued to operate on the assumption that given the court's ruling in the March 30 hearing, the SAC had been filed, and was the operative pleading in the case. Respondents recounted that the court found at the March 30 hearing that the SAC had been filed "as part of defendant Pillsbury, Madison, Sutro's motion to dismiss the second amended complaint." [ER 12 at 335; CR 303].

The lower court conducted no further hearings on respondents' motion for a default judgment nor did the

parties submit any additional briefing. [ER 16 at 561-62]. **Without any notice whatsoever to the parties, the district court, in its written order, reversed its previous ruling at the March 30, 2000 hearing (and turned upside down the basis on which the case had been litigated over four years since January 1996) and held that the SAC had not been filed.** *Id.* (Emphasis added).

For the first time in its order granting respondents' motion for a default judgment against Mr. Hickey on June 29, 2000, the district court indicated that the operative pleading in the case was the FAC, not the SAC.[6] In other words, the lower court ***first*** alerted Mr. Hickey that he was required to answer the allegations in the FAC, not SAC, ***after*** it entered judgment against him. But, perversely, the district court ***struck*** the recently filed answer to the FAC, and held that the clerk's default on the non-filed and non-operative SAC was, somehow, a clerk's default as to the FAC. *Id.* The court entered a default judgment against Mr. Hickey in the total amount of $2,370,634 for Fund I and $8,516,516.93 for Fund II. Mr. Hickey appealed the judgment, and it was affirmed in an unpublished opinion. [ER 18]. *Id.*

6. The Rule 60(b) Motion

Mr. Hickey timely filed a motion, pursuant to Fed. R. Civ. P. 60(b) for relief from the default judgment. [ER 19]. He argued, in the motion, that for all of the reasons set forth in the papers and hearings in connection with the entry of the default judgment, that judgment should be set aside as void. *Id.* Mr. Hickey further argued that the district court's ruling that Mr. Hickey's earlier challenge to the clerk's default and opposition to Respondents' motion for a default judgment was barred by untimeliness and

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[6] The district court held that: "[b]ecause the second amended complaint was never filed, the operative complaint . . . was the first amended complaint." [ER 13 at 523; CR 313].

laches did not apply to the timely motion to set aside default under Rule 60(b). Respondents argued that the Court did not have jurisdiction to rule on the motion because an appeal was pending, and, in any event, the arguments that the judgment were void had already been raised and were inappropriate for Rule 60(b) relief. [ER 20].

After Mr. Hickey filed a reply [ER 21], the Court ruled on the merits on August 9, 2001, and denied the motion stating that Mr. Hickey had not raised anything "new." [ER 22]. The Court then memorialized its ruling in a written order dated October 2, 2001 [ER 23], and Mr. Hickey filed a timely appeal. [ER 15].

7. The Ninth Circuit's Ruling On The 60(b) Appeal

The Ninth Circuit ruled that "law of the case" from the original appeal of the default judgment applied, *see* Appendix D, and failed to address any of Mr. Hickey's arguments, or the merits. In Mr. Hickey's Petition for Rehearing and Suggestion for Rehearing *En Banc*, he demonstrated why the doctrine of law of the case should not have been applied. These arguments are also presented herein.

REASONS FOR GRANTING THE WRIT

A. The Default Judgment Is Void Under Fed. R. Civ. P. 60(b)(4); The Second Amended Complaint Was Never Filed; The Plaintiffs Sought Clerk's Default On The Second Amended Complaint; The Plaintiffs Sought Default Judgment On The Second Amended Complaint; The Court Entered Default Judgment On The First Amended Complaint

1. A Motion To Set Aside Or Vacate A Void Default Judgment Is Clearly Cognizable Under Fed. R. Civ. P. 60(b)(4)

Motions to vacate a default judgment are cognizable under Fed. R. Civ. P. 60(b). *TCI Group Life Insurance Plan v. Knoebber*, 244 F.3d 691 (9th Cir. 2001). In this case, we

contend that the default judgment is void because it is based on a clerk's default on the wrong complaint, the Second Amended Complaint, a complaint which was neither served nor filed. It was also based on respondents' motion for default judgment on the Second Amended Complaint, a complaint which was neither served nor filed.

As a general matter, default judgments are only appropriate in extreme circumstances, and the purpose of Rule 60(b) is remedial, and it must be liberally applied. *Id.* at 695-96; *Falk v. Allen*, 739 F.2d 461, 463 (9th Cir. 1984) (per curiam). A case should, whenever possible, be decided on the merits. *Knoebber, supra*, at 696.

2. The Default Judgment Is Void And Should Have Been Set Aside Under Fed. R. Civ. P. 60(b)(3).

Respondents neither sought nor obtained entry of default on the First Amended Complaint. Fed. R. Civ. P. 55(a) provides that: "When a party against whom a judgment for affirmative relief is sought has failed to plead or otherwise defend as provided by these rules and that fact is made to appear by affidavit or otherwise, the clerk shall enter the parties default."

"A default may be entered by the clerk only with regard to a claim for affirmative relief against a party who has failed to plead or otherwise defend. These elements of a default must be shown by means of an affidavit or by other competent proof." Federal Practice and Procedure, Wright, Kane & Miller, section 2682 at 17.

While respondents sought and obtained entry of default on the Second Amended Complaint, the Second Amended Complaint was not the operative pleading because it was never filed. Because the clerk of court never entered default on the First Amended Complaint, the judgment entered by the district court based on the First Amended Complaint was defective. Essential prior to a default judgment is the entry of default. *See Detore v. Local #245 Jersey City Public Employees Union*, 511 F.Supp. 171, 176 (D.N.J. 1981) ("However, no default

judgment may be entered under either Fed. R. Civ. P. 55(b)(1) or (b)(2) unless a default has previously been entered by the clerk under 55(a). Thus, the entry of default is an essential predicate to any default judgment.").

The district court sidestepped this procedural error by broadly viewing the default entered by the clerk as not "in any way tether[ed] . . . to the second amended complaint." District court order at 9, [ER 14]. The court was wrong.

The default, in fact, was "tethered" to the Second Amended Complaint. Respondents' counsel's declaration in support of entry of default sets forth that Mr. Hickey has failed to timely respond to the Second Amended Complaint. Lawrence Decl. at para. 6, [ER 5]. The declaration fails to set forth when the First Amended Complaint was filed, when Mr. Hickey was required to respond to the First Amended Complaint or that he failed to timely respond to the FAC. In fact, the declaration never even mentions the First Amended Complaint.

The district court erred. The procedural requirements necessary for a valid default judgment cannot be so cavalierly dismissed. Under the district court's reasoning respondents can mix and match the complaint with the entry of default so as to justify a default judgment. The court in *Varnes v. Glass Bottle Blowers Assoc.*, 674 F.2d 1365 (11th Cir. 1982), rejected such a result-oriented approach.

In *Varnes*, plaintiff filed and served an original complaint. *Id.* at 1367. Thereafter, the court dismissed the complaint with leave to amend. *Id.* Plaintiff filed an amended complaint but did not properly serve it. *Id.* The defendant failed to respond to amended complaint and the clerk entered a default against defendant two months after the amended complaint had been filed. *Id.*

The lower court entered default judgment, and the court appeals reversed. In doing so, the court rejected the notion that "[a party] should not be able to engraft necessary portions of the amended complaint onto the original complaint to perfect the original complaint or have a court

reinstate a dismissed complaint for the sole purpose of legitimating a clerk's default." *Id.* at 1370.

Similarly, in this case, the district court ignored the reality that respondents sought and obtained entry of default on the Second Amended Complaint, not the First Amended Complaint, "for the sole purpose of legitimating a clerk's default." *Id.* Indeed, as the district court found, the SAC was a nullity because it was not filed, and when the clerk entered the default in August 1996 the only complaint was the First Amended Complaint.

B. Respondents And The District Court Failed To Provide Any Notice As Required By Fed. R. Civ. P. 55(b)(2) That They Moved For Default On The First Amended Complaint

1. A Violation Of Fed. R. Civ. P. 55(b)(2) Is Cognizable In A Motion To Set Aside Default Under Fed. R. Civ. P. 60(b)

When a court enters a default judgment in violation of Fed. R. Civ. P. 55(b)(2), the default judgment may be declared void under Fed. R. Civ. P. 60(b)(4), and set aside. *Roxford Foods v. Ford*, 12 F.3d 875, 879 (9th Cir. 1993). The failure to provide Rule 55(b)(2) notice is a serious procedural irregularity that usually justifies setting aside a default judgment or reversing for the failure to do so. *Id.* Reversal, however, is only required where a party has made an appearance. In this case, Mr. Hickey had appeared through counsel who filed several pleadings and appeared at several hearings challenging entry of the default judgment prior to its entry. In fact, Mr. Hickey first appeared, through counsel, in March, 2000. [CR 280].

In *United States v. Harre*, 983 F.2d 128 (8th Cir. 1993), the Eighth Circuit held that where, as here, a party files a late answer which is stricken prior to entry of a default judgment, that party has appeared through counsel for the purposes of raising a viable challenge under Rule 55(b)(2). 983 F.2d at 130.

2. The Court Violated The 3-Day Notice Of Provision Of Rule 55(b)(3)

Until the default judgment in this case was entered on June 29, 2000, the parties believed that the operative complaint in this case was the SAC. In fact, the district court had held at the March 30, 2000 hearing that the SAC was the operative complaint because it "was filed, albeit as part of a February 23rd, 1996 filing by the Pillsbury firm." Transcript of March 30, 2000 hearing at 44, [ER 10]. Then, in a stunning reversal, the court in its June 29, 2000 order held that inasmuch as the SAC had not been filed, the FAC was the operative pleading. *Id.*

Mr. Hickey was provided no notice that respondents moved for default judgment on the FAC. Indeed, respondents themselves did not know they sought a default judgment on the FAC until they read the court's June 29, 2000 order, because their papers and argument at the hearing were addressed to seeking a default judgment on the SAC. Further, the district court never brought up the possibility at the hearing, or at any other time prior to its filing of its opinion and the default judgment on the FAC, that it was considering entering judgment on the FAC. Because the district court only stated it was considering enforcing judgment on the SAC, the parties had no idea, until after receiving notice of the judgment, that a judgment on the FAC was being sought or entered.

Fed. R. Civ. P. 55(b)(2) provides, however, that: "If a party against whom judgment by default is sought has appeared in the action, the party (or, if appearing by representative, the party's representative) shall be served with written notice of the application for judgment at least 3 days prior to the hearing on such application."

The "failure to provide 55(b)(2) notice, if the notice is required, is a serious procedural irregularity that usually justifies setting aside a default judgment or reversing for the failure to do so." *Wilson v. Moore and Assocs., Inc.*, 564 F.2d 366, 369 (9th Cir. 1977). Such notice extends to informing a party what the court intends to examine at the hearing on the default judgment. *See, e.g., Pacheco v.*

Morales, 953 F.2d 15, 16 (1st Cir. 1992) (where district court failed to give notice "that it intended to investigate into liability at the hearing held after entry of default, Rule 55(b)(2) was violated").

Here, Mr. Hickey appeared through counsel in this matter in March, 2000. [CR 280]. Therefore, the improper notice of default judgment on the FAC requires reversal.

C. The Open-Ended *Post Hoc* Extension Of 120-Day Limit Service Was Improper Under Fed. R. Civ. P. 4(m)

An independent ground on which the lower court erred in entering the default judgment was excusing *post hoc* respondents failure to serve Mr. Hickey with the FAC for ten months.

Respondents presented no evidence of any attempts to serve Mr. Hickey during the five months between December 8, 1995 when Judge Smith supposedly "appeared willing to extend the time for service," and May 29, 1995, when Mr. Hickey was "served." Respondents presented no evidence whatsoever of any unsuccessful attempts to serve Mr. Hickey after the December 8, 1995 case management conference.

Respondents' violation of Fed. R. Civ. P. 4(m) resulted in invalid service, and a void default judgment under Fed. R. Civ. P. 60(b)(4). *See TCI Group Life Insurance Plan v. Knoebbler*, 244 F.3d 691 (9th Cir. 2001).

D. The District Court Erred In Striking The Answer To The First Amended Complaint; The Filed Answer Barred Entry Of Default Judgment Because Respondents Had Not Obtained A Clerk's Default On The First Amended Complaint Prior To Mr. Hickey's Filing An Answer To The First Amended Complaint.

No clerk's default can be entered pursuant to Fed. R. Civ. P. 55(a) if a defendant has filed an answer indicating his intent to defend the action. *Wickstrom v. Ebert*, 101

FRD 26, 33 (ED WI 1984). Even a late-filed responsive pleading prevents entry of a clerk's default. *Hudson v. State of North Carolina*, 158 FRD 78, 80 (SD W VA 1994). And, the entry of a clerk's default is a prerequisite to the district court entering a default judgment. *Detore v. Local #245 Jersey City Public Employees Union*, 511 F.Supp. 171, 176 (D.N.J. 1981).

In this case, respondents sought and obtained entry of the clerk's default on the SAC, not the FAC. Mr. Hickey filed an answer to the FAC. [ER 11]. This answer was filed *prior* to respondents' obtaining a clerk's default on the FAC. Mr. Hickey's answer to the FAC was also filed prior to the court entering default judgment on the FAC.

Because Mr. Hickey's answer to the FAC entitled him to defend the action – given the failure of respondents to obtain a clerk's default on the FAC prior to the filing of Mr. Hickey's answer to the FAC – the court erred in striking the answer. [ER 14].

Moreover, since the answer to the FAC entitled Mr. Hickey to defend this action, and since any entry of default judgment must be predicated on a clerk's default as to the complaint upon which the default judgment is requested to be entered, the district court erred in entering a default judgment against Mr. Hickey on the FAC after (a) an answer to the FAC had been filed; and (b) without any prior entry of clerk's default as to the FAC under Fed. R. Civ. P. 55(a).

E. Respondents' Law Of The Case Argument Was The Only Argument In Their Answering Brief Before The Ninth Circuit; They Did Not Respond To The Merits Of Mr. Hickey's Argument; By Incorrectly Resolving This Appeal Based Upon Law Of The Case, The Ninth Circuit Panel Is Permitting The Entry Of A Default Judgment Based Upon A Clerk's Default On A Different Complaint

In the original appeal in this matter, the panel upheld the entry of a default judgment on the first amended

complaint in spite of the fact that the clerk's default was on the second amended complaint, appellees moved for a default judgment on the second amended complaint, and all discussion, briefing and argument in the district court addressed the propriety of entering a default judgment on the second amended complaint – a complaint which was never filed. The panel found that Mr. Hickey's "implied" motions to lift the clerk's default because it was "void" as having been entered on the second amended complaint – where the district court later entered default judgment on the first amended complaint – were properly denied by the district court. This ruling was also based upon the fact that Mr. Hickey could not have procedurally challenged the clerk's entry of default because he waited too long to raise the argument. *See* Appendix D.

The reason the first panel found Mr. Hickey's motion to lift the clerk's default on the second amended complaint to be "implied" is because Mr. Hickey never made a motion to lift the clerk's default. It would have had to have been made *after* the district court entered judgment of default because it was not until the order accompanying the entry of default that all parties learned, for the first time, that the court was entering a default judgment on the first amended complaint. At the hearing on appellees' motion, the court addressed the actual motion – entry of a default judgment on the second amended complaint which was never properly filed. The court said it was inclined to find that the second amended complaint had, indeed, been filed because it was attached as an exhibit to one of appellees' motions. Therefore, no party had notice that the Court intended to enter judgment of default on the first amended complaint – relief not even been requested by respondents. *See* Opening Brief, First Appeal.

Mr. Hickey never moved to lift the clerk's default on the first amended complaint because such a motion would have been nonsensical and procedurally impossible on this record. After the district court entered default judgment on the first amended complaint, Mr. Hickey filed a notice of appeal. He did not move to lift the clerk's default, nor could he have because such a motion would not have been timely.

What Mr. Hickey actually did below was oppose appellees' motion for entry of a default judgment on the unfiled first amended complaint based upon the clerk's entry of default on the second amended complaint. Because the court, without notice to the parties, and not based upon any motion by appellees, entered default judgment on the first amended complaint, the court took an action which could only be challenged at the district court level by a motion for relief from a void judgment under Fed. R. Civ. P. 60(b)(4).

Once the default judgment was entered, however, Mr. Hickey had a right, under Fed. R. Civ. P. 60(b)(4), within one year, to move to challenge the judgment as void because it was based upon entry of a default judgment on a clerk's default on a different complaint. Mr. Hickey timely made such a motion and it was denied. He then timely filed this appeal.

In the opening brief before the Ninth Circuit, Mr. Hickey explained what occurred below, and why his motion under Fed. R. Civ. P. 60(b)(4) is appropriate. As a practical matter, it was possible to best explain this using the work already done on the brief before the first panel. However, the fact that this was the case does not make this appeal the same as the first one.

It is important to recognize, as is set forth in detail in the opening brief before the Ninth Circuit, that the district court's ruling that the judgment of default was to be entered on the first amended complaint was a surprise to everybody. That is why it was necessary to set forth the facts below as they were set forth in detail to the first panel. Once that fact is understood, the necessity of a Rule 60(b)(4) motion to challenge the district court's action can be similarly understood. *It was the only time the issue was raised with the district court, and it is the only time it is properly on appeal from an actual motion as opposed to from an "implied" motion found by the first panel but never made by Mr. Hickey.*

Respondents made a mistake by filing an answering brief not addressed to the merits, but, instead, addressed to

law of the case. There is no conceivable basis for permitting a default judgment to be entered on a clerk's default on a different complaint, and such a judgment is legally void.

The Panel's opinion states "In support of his appeal, Hickey has filed a brief that is nearly identical to the brief filed in his first appeal: Not only are the arguments the same, but the language is nearly identical." Appendix A at 2. The opinion goes on to say, "Here, appellant has failed to raise a single argument that would justify rehearing. He never suggests that the earlier panel made a clearly erroneous decision that wrought manifest injustice. Nor does he assert that any intervening authority has changed the relevant legal landscape or that any new evidence might undermine the original decision." Appendix A at 3.

First, the similarity of language in the two briefs has nothing to do with the doctrine of "law of the case." The question is whether the issues are the same. The issues, as pointed out in the opening brief, are not the same. This is an appeal from a timely filed motion under Fed. R. Civ. P. 60(b)(4) seeking to have the default judgment found to be void because it was entered based upon a clerk's default on a different complaint, and because Mr. Hickey was given no notice that a default judgment would be entered by the district court on the first amended complaint, rather than on the second amended complaint as respondents requested in their motion and at argument.[7] The former appeal was found to be from an untimely "implied" motion to lift the default, a motion which was never in fact filed. The former appeal was based upon a record involving a different motion and different arguments from the order – without notice to the parties – actually entered by the district court. The panel, in the former appeal, found, anyway, to address Mr. Hickey's Fed. R. Civ. P. 55(b)(2) and Fed. R. Civ. P. 55(b)(3) arguments. Therefore the law

[7] This latter issue was raised but never addressed by either panel of the Ninth Circuit to consider this case.

of the case could not possibly have applied to those arguments.

While the language of the two appeals is similar, the issues are quite different. It is the factual background which is the same. Respondents, and the Ninth Circuit panel, have bootstrapped the similarity of language in the two appeals and the similarity of the facts below into a position that the appeals are of identical issues. They are not. Therefore, the doctrine of "law of the case" does not even apply.

Second, the opening brief before the Ninth Circuit made it quite clear, contrary to the panel's statement, that "the earlier panel made a clearly erroneous decision that wrought a manifest injustice." That was the whole point of the opening brief before the Ninth Circuit. Because the currently entered default judgment is void, and is based upon a clerk's default on a different complaint, and on a district court ruling issues with no notice to the parties and granting different relief than that requested by respondents and discussed in the briefs and at argument before the district court, the decision by the earlier panel was clearly erroneous, and did result in manifest injustice. The opening brief in this appeal sets forth in detail why, legally and factually, this is so.

Third, as set forth herein, there has been intervening authority that the Ninth Circuit should have considered as militating against the discretionary application of law of the case here.

When a judgment of more than $10,000,000 is entered based upon default, the courts are inclined to allow such a case to proceed on the merits, if at all possible. Here, the judgment is void. Using the doctrine of "law of the case" to not address the merits of this timely and properly filed Rule 60(b)(4) motion is erroneous and inappropriate where the alleged previous opinion addressed different issues, and where application of the doctrine would be clear error and would work a manifest injustice.

F. The Law Of The Case Rule Should Not Apply To Mr. Hickey's Motion For Release From Default Judgment Under Fed. R. Civ. P. 60(b)(4) Because It Raises Different Issues Than The Earlier Appeal

The "doctrine of 'law of the case' deals with the effect of the first appellate decision on the subsequent *retrial or appeal:* the decision of an appellate court, stating a rule of law necessary to the decision of the case, conclusively establishes that rule and makes it determinative of the rights of the same parties in any subsequent retrial or appeal in the same case." *Morohoshi v. Pacific Home*, 34 Cal. 4th 482, 491 (2004), (citing 9 Witkin, Cal. Procedure (4th ed. 1997) Appeal, §895, p. 928). While a decision of the court, creating a rule of law necessary to the decision of the case, will serve as binding precedent on re-consideration of the same issues based on the same facts, it should not be applied in the instant matter where different legal arguments are presented. The original appeal from entry of the default judgement did not conclusively establish the rights of the parties as to the instant appeal of the Rule 60(b)(4) motion that the default judgment is void. Despite the previous denial of Mr. Hickey's opposition to the entry of the default judgement, he was still entitled to, and did, seek timely relief from the default judgement under Rule 60(b)(4) – because the judgment in this matter is void for the reasons described in the opening brief.

A Rule 60(b)(4) motion relies on different law and focuses on different facts than opposition to entry of a default judgment which usually involves issues related to the amount of damages, not entry of the judgment based upon a clerk's default. A Rule 60(b)(4) motion is allowable where a judgment is void – as in this case. *See* Fed. R. Civ. P. 60(b)(4). Since different issues are determined in a Rule 60(b) motion, appeal from its denial will depend on different facts or on differing emphasis in connection with the facts, than an appeal from default judgment. The law and facts set forth in Mr. Hickey's appeal of his Motion to Set Aside the Default Judgment under Fed. R. Civ. P. 60(b)(4), are based on different factual emphasis and rely on different

law as compared with the earlier appeal of the default judgment. Therefore, the "law of the case" doctrine should not apply.

G. Even If The Law Of The Case Rule Applies To Defendant's Motion Under Fed. R. Civ. P. 60(b)(4), There Are Valid Exceptions To The Rule Which Should Be Applied In The Instant Matter[8]

1. Changed Facts[9]

(i) The Defendant's Motion Was Timely

Unlike Mr. Hickey's "implied" motion to lift the clerk's default, ruled upon by the earlier panel, Mr. Hickey, in this appeal, made a timely motion under Fed. R. Civ. P. 60(b)(4) within one year of entry of the default judgment. Mr. Hickey could not properly have made a motion to declare the judgment void under Rule 60(b)(4) until *after* the entry of the default judgment or *after* the subject of the earlier appeal. The one-year time period did not begin to run until entry of the default judgment on June 29, 2000. The delay in entering the default judgment was entirely the fault of respondents; they waited several years to move for entry, and did not do so until prompted by the district court. Because of this delay, the time period for filing of Mr. Hickey's Rule 60(b)(4) motion did not begin to run until June 29, 2000. Mr. Hickey then moved, within one year, in a timely manner, to set aside the default judgment.

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[8] The Ninth Circuit has held that "a court may have discretion to depart from the "law of the case" if: (1) the first decision was clearly erroneous; (2) an intervening change in the law has occurred; (3) the evidence on remand is substantially different; (4) other changed circumstances exist; or (5) a manifest injustice would otherwise result." *United States v. Cuddy*, 147 F.3d 1111 (9th Cir. 1998), *citing United States v. Alexander*, 106 F.3d 874 (9th Cir. 1997).

[9] Points F and G, above, further set forth the changed facts in connection with this appeal.

(ii) Different Procedural Rules Apply

Under the rules governing civil procedure, a clerk's default serves to effectively cut off the defendant's right to appear in the action or to present evidence. *Clifton v. Tomb*, 21 F.2d 893, 897 (4th Cir. 1927). Therefore, the courts were not in the position to evaluate Mr. Hickey's arguments that the default judgment is void under Rule 60(b)(4). Further, under Rule 60(b)(4), the question is not whether Mr. Hickey has a defense on the merits, but whether the judgment is void. The first panel relied heavily on the rule, applicable to motion to lift a clerk's default, *that a defendant must advance a defense on the merits and Mr. Hickey did not do so.* In this appeal, from the district court's entry of a default judgment on a clerk's default on a different complaint, the question is *not* whether the clerk's default should be lifted, but whether the judgment is void. Therefore, the original panel's hearing reliance on the defense on the merits question is inappropriate to the changed facts in this appeal. The first panel *never* ruled on the issues before this panel: (a) can a default judgment be entered on a clerk's default on a different complaint, and (b) can a default judgment be entered on a complaint concerning which a defendant had no notice? The latter question *was never addressed by the first panel.*

2. Changed Laws

(i) Fed. R. App. P. 32.1

Effective January 1, 2007, all appellate decisions must be published and citable. Fed. R. App. P. 32.1, "Citing Judicial Dispositions," states, "A court may not prohibit or restrict the citation of federal judicial opinions, order, judgments, or other written dispositions that have been: (i) designated as 'unpublished,' 'not for publication,' 'non-precedential,' 'not precedent,' or the like; and (ii) issued on or after January 1, 2007." Under the rule, all decisions of this Court entered after January 1, 2007, are citable.

Mr. Hickey previously submitted a motion for publication to the first panel. The Ninth Circuit denied his request. The Court recognized its opinion was not for publication, and it could not be cited in future matters. The second

panel's decision, citing the earlier panel's decision *is* citable under Fed. R. App. P. 32.1. Therefore, this Court should be mindful of the precedential effect of a ruling allowing a default judgment to be entered on a complaint different from the one upon which the clerk entered default.

(ii) *Partington* And *Davis* Decided After The First Panel's Decision

Federal Rule of Civil Procedure 23(c)(1) states "[a]s soon as practicable after the commencement of action brought as a class action, the court shall determine by order where it is to be so maintained. An order under this subdivision may be conditional and may be altered or amended before the decision on the merits." Further, the Respondents have the burden of showing that they represent a class, and relief cannot be granted to a class before an order has been entered determining that class treatment is proper. *Davis v. Romney*, 490 F.2d 1360, 1366 (3rd Cir. 1974), *citing Moore, 3B Moore's Federal Practice*, ¶ 23.02-2 (2d Ed. 1969). Therefore, a judgment cannot be enforced by an uncertified class.

In *Partington v. American International Specialty Lines*, 443 F.3d 334, 336-337 (4th Cir. 2006), the court held that "the judgment was unenforceable in that it awarded damages to an uncertified [] class" but that the judgment could be enforced with respect to the investor, the sole class member named in the complaint. "Federal courts may only adjudicate the rights of putative class members upon certification of that class under Federal Rule of Civil Procedure 23. *Id.* at 340 (*citing Washington v. Finlay*, 664 F.2d 913, 928 (4th Cir. 1981) (noting that members of an uncertified putative class are not bound by, and obtain no legal benefit from a judgment on the merits)). Certification is contingent upon the trial court's satisfaction "after a rigorous analysis, that the prerequisites of Rule 23(a) have been satisfied." *Id.* (*citing Gen Tel. Co. of the Sw. v. Falcon*, 457 U.S. 147, 161 (1982)). Because the class was never certified as to the first amended complaint, the complaint upon which the default judgment was entered, the judgment is void.

In *Davis v. Hutchins*, 321 F.3d 341 (7th Cir. 2003), the district court did not certify the class under Fed. R. Civ. P. 23, yet respondents attempted to argue that the class had been effectively certified by the entry of a default judgment. The Seventh Circuit did not agree, based on the "rigorous" requirements for class certification before a judgment can be enforced by a plaintiff class. And "[c]ompliance with Rule 23 must be "actual, not presumed." *Partington*, 443 F.2d 334 at 340 (*citing Gen. Tel. Co. of the Sw. v. Falcon*, 457 U.S. at 160).

The default judgment on the first amended complaint in favor of a class never certified by the district court is, accordingly, void based upon a change in the law which occurred subsequent to the decision of the first panel.

H. The Ninth Circuit Erred In Failing To Address Mr. Hickey's Argument That The Default Judgment Was Void Under Fed. R. Civ. P. 60(b)(4) Because Every Court Must Address The Question Of Subject Matter Jurisdiction Prior To Any Other Issue

The Ninth Circuit failed to address Mr. Hickey's argument that the default judgment was void because it was entered on a complaint not supported by a clerk's default. In fact, Mr. Hickey, as was his right, filed an answer to the first amended complaint. No clerk's default was ever obtained on it. The district court had no jurisdiction to enter the void default judgment, and the Ninth Circuit had no jurisdiction to affirm it.

Further, as pointed out herein, the class action judgment was entered on an uncertified class. The district court certified the class for the second amended complaint, but the second amended complaint was never filed. The district court never certified the class for the first amended complaint – the complaint which was later ruled to have been the "operative" complaint served on Mr. Hickey. For this additional reason, the default judgment was void, the district court had no jurisdiction to enter it, and the Ninth Circuit had no jurisdiction to uphold it.

Subject matter jurisdiction is the first question to answer for all federal courts. *Bender et. al. v. Williamsport Area School District et. al.*, 475 U.S. 534, 541-42 (1986). Appellate courts must answer the question for themselves, and for the lower court who previously addressed – or failed to address – the issue. *Id.* It is the first and fundamental question before any court. *Great Southern Fireproof Hotel Company v. Jones*, 177 U.S. 449 (1900). Here, the Ninth Circuit, faced with Mr. Hickey's contention that the district court had no subject matter jurisdiction to enter a default judgment, failed to rule on the question. Instead, it concluded that it need not address the issue based upon the "law of the case" doctrine. This was error. The Ninth Circuit was obligated to determine if the district court had jurisdiction to enter the judgment of more than $10,000,000, or whether it was void as Mr. Hickey contends. This Court, similarly, has the obligation to first address Mr. Hickey's jurisdictional claims, without relying on the Ninth Circuit's determination to decide this appeal based upon the law of the case doctrine.

In *Steel Company v. Citizens for a Better Environment*, 523 U.S. 83 (1998), the Court concluded that jurisdiction must be established as a threshold matter. It arises from the nature and limits of the judicial power, and was inflexible and without exception. If, as Petitioner Hickey contends, the district court was without jurisdiction to take the action it took, and to enter the judgment it did, the Ninth Circuit was wrong in failing to address the question. It was a threshold question, to be determined before debating the niceties of the "law of the case doctrine." This matter should be remanded to the Ninth Circuit to consider the merits of this appeal, and to determine if Mr. Hickey is correct that, under Fed. R. Civ. P. 60(b)(4), the judgment against him is simply void for lack of jurisdiction by the district court to enter it.

CONCLUSION

For the foregoing reasons, Petition John Hickey requests that this Petition for Writ of Certiorari be granted.

Respectfully submitted,

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APPENDIX A

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

A. LEE BIANCUR; LINDA BIANCUR; LA RUE W. BEAN; ALLEN MURPHY; ROBERT SCHLENZIG; GAIL SCHLENZIG, on behalf of themselves and others similarly situated, Plaintiffs-Appellees, v. JOHN A. HICKEY, Defendant-Appellant.	No. 01-17238 D.C. No. CV-95-02145-WHA MEMORANDUM* (Filed Feb. 22, 2007)

Appeal from the United States District Court
for the Northern District of California,
William H. Alsup, District Judge, Presiding.

Submitted February 13, 2007**
San Francisco, California

Before: B. FLETCHER, CLIFTON, and IKUTA, Circuit Judges.

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* This disposition is not appropriate for publication and is not precedent except as provided by 9th Cir. R. 36-3.

** This panel unanimously finds this case suitable for decision without oral argument. *See* Fed. R. App. P. 34(a)(2).

John A. Hickey appeals the district court's denial of his motion for relief from default judgment. Hickey argues that the underlying default was void and that the district court's refusal to grant post-judgment relief was an abuse of discretion. We reject these arguments and affirm.

In the action underlying this appeal, plaintiffs brought a securities class action suit against Hickey and others. Although Hickey was served in 1996, he did not make an appearance in the case until 2000 after plaintiffs had already moved for entry of default judgment against him. The district court granted plaintiffs' application for entry of default judgment and ordered Hickey to pay damages. Hickey appealed to this court, and we affirmed the district court's judgment. *See Biancur v. Hickey*, 32 Fed. Appx. 949 (9th Cir. 2002).

While his first appeal was pending, Hickey filed in district court a motion for relief from judgment pursuant to Fed. R. Civ. P. 60(b). The district court denied the motion and Hickey now appeals that denial. In support of this appeal, Hickey has filed a brief that is nearly identical to the brief filed in his first appeal: Not only are his arguments the same, but the language is nearly identical.

According to the well-established law of this Circuit, we "do[ ] not reconsider matters resolved on a prior appeal." *Bean v. Calderon,* 163 F.3d 1073, 1078 (9th Cir. 1998) (quoting *Jeffries v. Wood,* 114 F.3d 1484,

1488-89 (9th Cir. 1997) (en banc) (overruled on other grounds)). "The law of the case doctrine states that the decision of an appellate court on a legal issue must be followed in all subsequent proceedings in the same case." *In re Rainbow Magazine, Inc.*, 77 F.3d 278, 281 (9th Cir. 1996) (quoting *Herrington v. County of Sonoma*, 12 F.3d 901, 904 (9th Cir. 1993)).

Law of the case is a discretionary doctrine, but that discretion has certain limits. *See Thomas v. Bible*, 983 F.2d 152, 155 (9th Cir. 1993). Specifically, the previous panel decision should be followed unless: "(1) the decision is clearly erroneous and its enforcement would work a manifest injustice, (2) intervening controlling authority makes reconsideration appropriate, or (3) substantially different evidence was adduced at a subsequent trial." *Tahoe-Sierra Preservation Council, Inc. v. Tahoe Regional Planning Agency*, 216 F.3d 764, 787 (9th Cir. 2000) (quoting *Jeffries*, 114 F.3d at 1489). Here, appellant has failed to raise a single argument that would justify rehearing. He never suggests that the earlier panel made a clearly erroneous decision that wrought a manifest injustice. Nor does he assert that any intervening authority has changed the relevant legal landscape or that any new evidence might undermine the original decision. Indeed, Hickey offers nothing more than the very same arguments – couched in the very same language – that were rejected by the previous panel. The law of the case doctrine requires that we accept

the decision of the previous panel and affirm the dismissal by the district court.

AFFIRMED.

APPENDIX B

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

A. LEE BIANCUR; LINDA BIANCUR; LA RUE W. BEAN; ALLEN MURPHY; ROBERT SCHLENZIG; GAIL SCHLENZIG, on behalf of themselves and others similarly situated, Plaintiffs-Appellees, v. JOHN A. HICKEY, Defendant-Appellant.	No. 00-16435 D.C. No. CV-95-02145-WHA MEMORANDUM* (Filed Apr. 5, 2002)

Appeal from the United States District Court
for the Northern District of California,
William H. Alsup, District Judge, Presiding.

Argued and Submitted March 12, 2002
San Francisco, California

Before: BRUNETTI, LEAVY and T.G. NELSON, Circuit Judges.

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* This disposition is not appropriate for publication and may not be cited to or by the courts of this circuit except as may be provided by Ninth Circuit Rule 36-3.

John A. Hickey appeals the district court's entry of judgment against him. He argues that entry of judgment was inappropriate because the default on which judgment was predicated was void. We have jurisdiction pursuant to 28 U.S.C. § 1291, and we affirm.

The district court did not abuse its discretion[1] when it declined to lift the default on the asserted grounds that service of process had been delayed without good cause shown. The court never provided notice to the plaintiffs that it would, on its own initiative, dismiss the action against Hickey if good cause for the delay was not shown, as required by Federal Rule of Civil Procedure 4(m). Hickey also did not timely move for dismissal under Rule 4(m), triggering the requirement that plaintiffs show good cause under that rule. Moreover, plaintiffs have successfully demonstrated that if they had been required to show good cause during the period for service, they could have done so. The default was not void on the ground that good cause was not shown at the time of the delay in service.

The district court also correctly rejected Hickey's arguments that the default was void because the district court dismissed the first amended complaint in its entirety when it granted three other defendants' motions to dismiss; and because the clerk entered default as to the second amended complaint, which was never filed and never properly served on Hickey.

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[1] *Brady v. United States*, 211 F.3d 499, 502 (9th Cir.), *cert. denied*, 531 U.S. 1037 (2000).

The district court correctly concluded that the first amended complaint remained operative as to Hickey. Nothing in the motions to dismiss filed by the three other defendants sought dismissal of the claims against Hickey, nor could they properly have done so. And nothing in the district court's orders granting those motions purported to dismiss the complaint against Hickey. Accordingly, the first amended complaint, which was properly served on Hickey, remained operative as to him.

The district court also correctly concluded that the clerk entered default as to the first amended complaint. Plaintiffs' reference to the second amended complaint in the affidavit accompanying the application for default was simple – and harmless – error on the part of the plaintiffs' attorney.

We note, in further support of the district court's sound decisions on Hickey's implied motions to lift the default, that Hickey advances no meritorious defense to any of the claims in the complaint and that his motions were hardly timely.[2] For the foregoing reasons, we affirm.

AFFIRMED.

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[2] *See O'Connor v. Nevada*, 27 F.3d 357, 364 (9th Cir. 1994) (noting that when "timely relief is sought from a default . . . and the movant has a meritorious defense" courts should favor setting aside a default) (internal quotations and citations omitted).

APPENDIX C

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UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

A. LEE BIANCUR and LINDA BIANCUR; LA RUE W. BEAN; ALLEN J. MURPHY; and ROBERT and GAIL SCHLENZIG; On Behalf Of Themselves And Others Similarly Situated, Plaintiffs, v. JOHN A. HICKEY; MAMIE TANG; PILLSBURY MADISON	Case No.: C 95-2145 WHA ORDER APPROVING STIPULATION OF PARTIES TO FILE PARTIAL SATISFACTIONS OF JUDGMENT AND DENYING MOTION TO VACATE JUDGMENT

& SUTRO; ZRENDA, DUNN & SWAN; and D.E. FREY, A Broker-Dealership And Member Of The National Association Of Securities Dealers, On Behalf Of Itself And As A Representative Of A Class Of Broker Dealers;

Defendants.

Following a hearing on August 9, 2001, on a motion brought by counsel for defendant John A. Hickey to set aside the judgment, and based upon the submissions of the parties, and it appearing to the Court that the parties have subsequently met and conferred, as ordered by the Court, for the purpose of agreeing on a procedure for reducing the judgments obtained against both John A. Hickey and Mamie Tang by reason of payments that were distributed by the receiver in *SEC v. Hickey, et al.*, Case No. C-94-3336-WHA, to those class claimants in the above-captioned case who were also claimants in the SEC action, and that counsel for plaintiffs, with the approval of counsel for John A. Hickey, has submitted a Notice of Compliance With Court's Order of August 9, 2001, filed August 30, 2001, (the "Notice") memorializing this procedure; and it appearing, based on the representations of counsel, that counsel for plaintiff has previously sent counsel for John A. Hickey a chart calculating the applicable partial satisfactions of Judgments for his review and approval, and that

counsel for John A. Hickey has approved said calculations; and good cause appearing.

IT IS HEREBY ORDERED that,

1. The motion to set aside the judgment is denied;

2. Subject to the other terms of this order, the procedures outlined in the correspondence attached to the Notice for calculating offsets to the existing judgments entered against both John Hickey and Mamie Tang are approved; and

3. Within ten (10) days following the date of this order, counsel for plaintiff shall cause to be filed/recorded, as applicable, partial satisfactions of judgments as to both Mamie Tang and John A. Hickey in all counties where such abstracts of judgment were filed recorded according to the calculations attached hereto as Exhibit A.

Dated: October 2, 2001

WILLIAM ALSUP
Hon. William H. Alsup
United States District
Court Judge

Approved As To Form:

/s/ David A. Cohen
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APPENDIX D

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

A. LEE BIANCUR; et al., Plaintiffs-Appellees, v. JOHN A. HICKEY, Defendant-Appellant,	No.: 01-17238 D.C. No. CV-95-02145-WHA Northern District of California, San Francisco ORDER (Filed May 17, 2007)

Before: B. FLETCHER, CLIFTON, and IKUTA, Circuit Judges.

The panel has voted to deny the petition for panel rehearing. Judges Clifton and Ikuta vote to deny the petition for rehearing en banc and Judge B. Fletcher so recommends.

The full court has been advised of the petition for rehearing en banc and no judge has requested a vote on whether to rehear the matter en banc. Fed. R. App. P. 35.

The petition for panel rehearing and the petition for rehearing en banc are denied.